

A **Yip Shou Shan v**
Sin Heap Lee-Marubeni Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-761 OF 1993
 MOHD NOOR AHMAD J
 23 NOVEMBER 2001

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Tort — Trespass to land — Damages — Quantum of — Encroachment and loss of soil to soil support — Deliberate and intentional trespass — Real probability of prejudice to plaintiff's development of land — Cost of repair and reinstatement awarded — Conduct of defendant considered, whether exemplary damages justified

C

Tort — Trespass to land — Right of plaintiff to bring action — Doctrine of relation back — Plaintiff entitled to possession of land but yet to take physical possession — Whether plaintiff entitled to maintain action even though not in physical possession at time of trespass — Whether issue of possession properly pleaded

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Tort — Trespass to land — Physical damage — Encroachment and loss of soil to soil support — Real probability of prejudice to plaintiff's development of land

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The plaintiff owned Lot 1360 and the defendant owned Lot 157 situated in the Mukim of Cheras, District of Hulu Langat, Selangor. Lot 1360 was separated on its southern boundary from Lot 157 by a strip of state land approximately 40 feet wide ('the access reserve'). The defendant had carried on development works on its land for the purpose of developing a golf course and a huge residential and commercial complex. The development had resulted in physical damages to the plaintiff's land. Sometime in February 1996, the defendant, without the plaintiff's consent, constructed a crib-wall on the access reserve part of which was on the plaintiff's land. The plaintiff brought an action against the defendant for general damages and exemplary damages based on trespass and nuisance. The defendant contended that there were two incidents of trespass and that at the time of first incident, the plaintiff was neither the registered proprietor nor was he in legal possession of Lot 1360 and hence the plaintiff did not have the capacity to maintain an action in this respect; and that as for the second incident, that the trespass was incidental and minimal besides being unintentional and was mitigated by the need to do so in order to lower the levels on the access reserve.

F**G****H****Held:****I**

- (1) As at 29 June 1991, the vendor was a bare trustee and the plaintiff became entitled to possession of the land in law; and by cl 6 of the agreement, the plaintiff was contractually entitled to vacant possession on completion of the sale; and hence, the plaintiff's right of entry accrued on 29 June 1991. By the doctrine of relation back, if an owner who has a right to enter makes an entry on land, his right of possession is related back to the time at which his right

of entry accrued, and he may sue for a trespass committed before his entry, the wrongdoer thus becoming a trespasser by relation. The plaintiff and his agents entered and took physical possession of the land on 18 July 1991, that is to say, before the first incident when the first survey was conducted. Therefore, by the doctrine of relation back, the plaintiff was clearly entitled to maintain this action even though he was not in physical possession at the time of the first incident (see p 122E–G).

- (2) The issue of possession was not pleaded by the defendant. Trespass was essentially an interference with the possessory rights and not ownership, since registered ownership does not usually connote legal possession. Therefore, on the pleadings as it stood and the evidence adduced, in law and in the interest of justice, the defendant should not be allowed to submit on the issue of possession, being repugnant to all three situations as envisaged in O 18 r 8(1) of the Rules of the High Court 1980. The proper defence to trespass to land is to deny possessory title of the plaintiff which must be specifically pleaded (see pp 122H, 123A–C).
- (3) The physical damage caused by the defendant's trespass had resulted in the withdrawal of soil to soil support and the loss of lawful use of the land by the plaintiff. The crib-wall built by the defendant was to be regarded only as a temporary measure because not only it did not at all protect the plaintiff's land but it was also not sufficient to prevent future soil failures, that is to say, the crib-wall would not guarantee the stability of the slope. There was a real probability, not just a possibility, of prejudice to the plaintiff's intended development of his land; *Wong See Lee & Ors v Ting Siik Lay* [1997] 2 CLJ 205 followed. If the plaintiff intended to develop his land, extra protection of the slope would be needed or a very expensive foundation works would be required for any building to be built near the slope (see p 120C–D, F–G).
- (4) The defendant was liable to the plaintiff both in trespass and nuisance and the plaintiff had suffered actual damage in consequence of the torts committed by the defendant (see p 123F–G).
- (5) Whichever value of the land was taken for the assessment of compensatory damages, that is to say, either the value at the time when the torts were committed or the value at the date of the valuation, it would be unrealistic and unfair to either party, as the case may be. Therefore, the court declined to assess damages by taking the capital value of the property in an undamaged state, that is to say, diminution in value cannot be the true measure of damages in this case. And also, on the facts, the court was unable to assess as such. Hence, the only alternative left was to take the cost of repair or reinstatement, which was the true measure or damage since the court was satisfied from the evidence that all

- A along the plaintiff intended to develop the land according to the subdivision as approved (see pp 125F–G).
- (6) The facts of the case also justified an award for exemplary damages. The defendant's trespass was deliberate and intentional and carried out with a cynical disregard for the plaintiff's rights.
- B The defendant's conduct was calculated to result in a profit and it was reasonable to gather from para 12 of the defence that the defendant obviously felt that the gain from the deliberate trespass would outweigh the compensation he might have to pay. Finally, the conduct of the defendant from 1991 to the trial of the action had been reprehensible (see p 127F–G, 128A–B).
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[Bahasa Malaysia summary]

- D Plaintiff merupakan pemilik Lot 1360 dan defendan merupakan pemilik Lot 157 di Mukim Cheras, Daerah Hulu Langat, Selangor. Lot 1360 dipisahkan di sempadan selatannya dari Lot 157 oleh sebidang tanah kerajaan kira-kira 40 kaki lebar ('jalan masuk tersebut'). Defendan telah menjalankan kerja-kerja pembangunan ke atas tanah tersebut untuk membangunkan padang golf dan kompleks perumahan dan komersial yang besar. Pembangunan tersebut mengakibatkan kerosakan kepada tanah plaintif. Dalam bulan Februari 1996, defendan telah, tanpa mendapatkan izin plaintif, mendirikan 'crib wall' di atas jalan masuk tersebut di atas tanah plaintif. Plaintif telah memulakan tindakan terhadap defendan untuk ganti rugi am dan ganti rugi teladan berdasarkan kacau-ganggu dan pencerobohan. Defendan menyatakan bahawa terdapat dua kejadian pencerobohan, dan semasa pencerobohan pertama, plaintif bukan
- E merupakan pemilik berdaftar ataupun berada di dalam milikan yang sah Lot 1360 dan oleh itu, plaintif tidak boleh mengekalkan tindakan tersebut. Bagi pencerobohan kedua pula, pencerobohan tersebut bersampingan dan minimum dan tidak disengajakan, dan ia dikurangkan melalui keperluan untuk berbuat demikian supaya
- F mengurangkan ketinggian jalan masuk tersebut.
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Diputuskan:

- (1) Pada 29 Jun 1991, penjual merupakan pemegang *bare trust*, dan plaintif berhak kepada milikan tanah tersebut di sisi undang-undang; dan melalui kl 6 perjanjian tersebut, plaintif berhak diberi milikan kosong setelah jualan disempurnakan, dan oleh yang demikian, hak plaintif untuk masuk terakru pada 29 Jun 1991. Melalui doktrin 'relation back', jikalau seseorang pemilik berhak memasuki tanah, hak milikannya dikaitkan balik kepada masa apabila hak masuknya terakru, dan beliau boleh mendakwa untuk pencerobohan yang berlaku sebelum kemasukkannya,
- H menjadikan orang yang bersalah itu seorang penceroboh melalui perkaitan tersebut. Plaintif dan agen-agennya masuk dan telah
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mengambil milikan fizikal tanah tersebut pada 18 Julai 1991, iaitu, sebelum kejadian pertama semasa tinjauan pertama sedang dilakukan. Oleh itu, melalui doktrin 'relation back', plaintif jelas berhak mengekalkan tindakannya walaupun beliau tidak mempunyai milikan fizikal ketika kejadian pertama tersebut (lihat ms 122E-G).

- (2) Isu milikan tidak diplidkan oleh defendan. Pencerobohan merupakan campur tangan dalam hak milikan dan bukan pemunyaan memandangkan bahawa pemunyaan berdaftar biasanya tidak membawa konotasi milikan di sisi undang-undang. Oleh itu, berdasarkan pliding-pliding dan keterangan yang dikemukakan, di sisi undang-undang dan di dalam kepentingan keadilan, defendan tidak sepatutnya dibenarkan berhujah mengenai isu milikan, kerana ianya bertentangan dengan ketiga-tiga situasi seperti di dalam A 18 k 8(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Pembelaan terhadap pencerobohan yang betul adalah untuk menafikan hakmilik pemilikan plaintif, yang mesti diplidkan secara khusus (lihat ms 122H, 123A-C).
- (3) Kerosakan fizikal yang disebabkan oleh defendan telah mengakibatkan pengunduran sokongan tanah ke tanah dan kehilangan kegunaan tanah yang sah oleh plaintif. 'Crib wall' yang didirikan oleh defendan hanya merupakan alat sementara kerana ia bukan sahaja tidak melindungi tanah plaintif tetapi juga tidak mencukupi untuk menghalang keruntuhan tanah pada masa hadapan, iaitu 'crib wall' tersebut tidak dapat menjamin kestabilan cerun tersebut. Terdapat kebarangkalian besar, dan bukan setakat kemungkinan sahaja, prejudis terhadap pembangunan tanah plaintif yang diniatkan; *Wong See Lee & Ors v Ting Siik Lay* [1997] 2 CLJ 205 diikuti. Jikalau plaintif berniat membangunkan tanahnya, perlindungan cerun yang lebih diperlukan ataupun kerja asas yang mahal diperlukan bagi membolehkan bangunan-bangunan didirikan dekat cerun tersebut (lihat ms 120C-D, F-G).
- (4) Defendan bertanggungjawab terhadap plaintif dalam pencerobohan tersebut dan kacau-ganggu dan plaintif telah mengalami kerugian ketara diakibatkan oleh tort yang dilakukan oleh defendan (lihat ms 123F-G).
- (5) Walau apapun nilai tanah yang diambil sebagai taksiran ganti rugi pampasan, iaitu, sama ada nilai tanah pada masa tort tersebut dilakukan ataupun nilai tanah pada tarikh taksiran, ia akan menjadi tidak realistik dan tidak adil kepada parti-parti. Oleh itu, mahkamah enggan mengira ganti rugi dengan mengambil nilai modal hartanah tersebut sebelum dirosakkan, iaitu, pengurangan nilai bukan merupakan nilai kerugian dalam kes ini. Pada fakta, mahkamah tidak dapat menilai seperti berikut. Oleh itu, alternatif yang tinggal adalah untuk mengambil kos pembaikan atau pengembalian tanah kepada keadaan asalnya, yang mana

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- A** mahkamah berpendapat adalah nilai kerugian yang sebenarnya, memandangkan bahawa mahkamah berpuas hati bahawa plaintif berniat membangunkan tanah tersebut menurut subdivisi yang disahkan (lihat ms 123F–G).
- B** (6) Fakta kes ini juga menjustifikasikan award untuk ganti rugi teladan. Pencerobohan oleh defendan adalah secara sengaja dan telah dilakukan tanpa menghiraukan hak-hak plaintif. Kelakuan defendan dikira untuk membawa keuntungan, dan adalah munasabah untuk menyatakan, dari perenggan 12 pembelaan, bahawa defendan telah berpendapat bahawa keuntungan daripada pencerobohan akan melebihi pampasan yang beliau mungkin terpaksa membayar. Kelakuan defendan dari 1991 sehingga perbicaraan tindakan tersebut patut dikeji (lihat ms 127F–G, 128A–B).]
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Notes

- D** For cases on trespass to land, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1261–1305.

Cases referred to

- E** *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 (refd)
- Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352 (refd)
- Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors* [1980] 1 All ER 928 (refd)
- F** *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309 (refd)
- Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (refd)
- Rookes v Barnard* [1965] AC 1129 (refd)
- Templeton v Low Yat Holdings Sdn Bhd* [1993] 1 MLJ 443 (refd)
- Wong See Lee & Ors v Ting Siik Lay* [1997] 2 CLJ 205 (folld)

G Legislation referred to

Rules of the High Court 1980 O 18 r 8(1)

Raja Aziz Addruse (NS Nijar and Liza Chan with him) (Peter Yip & Yong) for the plaintiff.

- H** *Robert Lazaar (Alan KC Su with him) (Chan & Associates)* for the defendant.

Mohd Noor Ahmad J: The plaintiff sued the defendant for general damages and exemplary damages based on trespass and nuisance. He also asked for the following declarations and injunctions:

- I** (a) a declaration that the defendant is not entitled to cut or alter the public road access or otherwise appropriate the road reserve so as to deprive the plaintiff of access to his land;

- (b) a declaration that the plaintiff is entitled to use and enjoy the road reserve as access to the plaintiff's land or the right of support to the said land; A
- (c) an injunction to restrain the defendant whether by himself, his servants or his agents howsoever from encroaching onto the plaintiff's land; B
- (d) a mandatory injunction directing the defendant to forthwith at its own costs reinstate and rehabilitate the ground levels of the plaintiff's land and the road reserve adjoining the said land:
 - (i) by constructing a reinforced earthwall at the boundary between the defendant's land and the road reserve to the height up to the utmost original ground level; and C
 - (ii) thereafter by backfilling with sand and earth up to the level of the reinforced earthwall;
- (e) a mandatory injunction directing the defendant to forthwith at its own costs construct an access to the south east boundary of the road reserve of the plaintiff's land at a level of 60m and for this purpose, do construct a reinforced earthwall at both sides of the 66ft road reserve on the defendant's land to allow for the access; D
- (f) a mandatory injunction directing that in the execution and completion of the abovesaid works, the defendant do comply at its own costs with the Earthwork Plan and Reinforced Earthwall details as shown in the Drawings No PB9200 SP-1 and No PB9200 CS1 and Specifications prepared by the Consulting Engineers, Messrs Perunding Bakti Sdn Bhd and annexed hereto as Annexure 1; and E
- (g) an order that the completion of the abovesaid works be evidenced by a certificate of completion to be issued by the aforesaid consulting engineers. F

The facts reveal that: The plaintiff is the owner of Lot 1360 and the defendant owns Lot 157 situated in the Mukim of Cheras, District of Hulu Langat, Selangor. Lot 1360 is separated on its southern boundary from Lot 157 by a strip of state land approximately 40ft wide ('the access reserve'). G

On trespass, the defendant had carried on development works on its land for the purpose of developing a golf course and a huge residential and commercial complex known as 'Bandar Sungei Long'. The development had resulted in physical damage to the plaintiff's land as evidenced by a survey conducted on 11 January 1993, and plan (B-20) prepared by SP2 which shows a steep slope of about 100ft high and 650ft long and about 49ft deep into the plaintiff's land. The slope is sited entirely on the plaintiff's land falling on to the access reserve. The evidence constitutes trespass to the plaintiff's land by the defendant and this is my finding. It is also evident that sometime in February 1996, the defendant, without the plaintiff's consent, constructed a crib wall on the access reserve part of which is on the plaintiff's land, as confirmed by SD5 and exh P10. This constitutes a permanent trespass on the plaintiff's land by the defendant, and this is also H

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- A** my finding but not for the purpose of finding on liability for permanent trespass.

In respect of nuisance, the claim arises from the withdrawal of soil to soil support and the loss of lawful use of the land by the plaintiff resulting from the physical damage caused by the trespass. This is evidenced by the report of SP5 (consulting engineer) and his testimony, and substantiated by the need to construct a crib wall on part of the slope by the defendant and the photographic evidence of slope failures.

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- C** SP5 stated in his report (B-75) that a soil test was carried out in March 1993 for analysis of slope stability and found that the slope had a safety factor of less than 1 as opposed to a normally acceptable safety factor of 1.4. He inspected the site and noted a failure at the bottom of the slope as shown in the photograph (B-85). He opined that the slope was unstable and further failures would occur unless remedial measures were taken if the plaintiff was to retain the integrity of the use of the land. Further, the locations of buildings for the development of the plaintiff's land would require a set back very much away from the boundary to ensure their safety from the inevitable slope failure, or failing which, a very expensive foundation work had to be carried out. He concluded that it would be inadvisable to construct any permanent structure within a distance of 32m from the top of the slope without very expensive foundation works. The appropriate setback of the building line is shaded in red in B-87. According to him, the plaintiff's loss of earth is 0.6294 acres, and in order to stabilize the slope, the loss for the setback is 1.2843 acres (see ex P8). SP5 was not seriously challenged on this issue.
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SP5 was of the view that the crib wall (in two tiers) was constructed to prevent further soil failures. The question is whether crib wall as constructed is sufficient to prevent further soil failures? To my mind, it is not, for the following reasons:

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- (i) SD5, a professional engineer with the defendant's project manager confirmed that the purpose of the crib wall was to protect the lower portion of the slope;
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- (ii) SP5 observed from the design calculations of the crib wall (exh D9) that the calculations were only for the total height of 39ft, but the total height to be protected was approximately 70ft (as illustrated in exh P10) and therefore, the top slope which should be protected as well was not protected. Further, the top crib wall did not cover the whole length of the slope, and if the plaintiff intended to develop his land extra protection of the slope was required. In short, the plaintiff's land was not protected at all;
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- (iii) As noticed by SP5, the photographs, exh P2 E, F & H show that there was evidence of slope failures at the top of the crib wall even while it was being constructed;
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- (iv) SD5 agreed that the top slopes and the slopes on the left and right were not protected by the crib wall. But he said that the slopes were stable based merely on calculations without any soil test done.

Further, he did not take into account of future development by the plaintiff in arriving that the slopes, though not protected by the crib wall, were stable;

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(v) the defendant merely tendered the technical report on the crib wall (exh D9), but offered no evidence on the effect of the crib wall on the stability of the slope;

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(vi) based on exh P10, SP5 concluded that with the existing crib wall only, it would be necessary to provide the setback as in exh P8.

SP5 was not seriously challenged on matters in paras (ii), (iii) and (vi).

Therefore, in the light of the above facts it is my findings that:

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(i) the physical damage caused by the defendant's trespass had resulted in the withdrawal of soil to soil support, and the loss of lawful use of the land by the plaintiff;

(ii) the crib wall built by the defendant is to be regarded only as a temporary measure because not only does it not at all protect the plaintiff's land, but also it is not sufficient to prevent future soil failures, that is to say, the crib wall does not guarantee the stability of the slope. There is a real probability, not just a possibility, of prejudice to the plaintiff's intended development of his land, in view of what was said by Mohd Azmi FCJ in *Wong See Lee & Ors v Ting Sook Lay* [1997] CLJ 205 at p 224:

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In our view, the courts are entitled to take judicial notice of the fact that Malaysia records one of the highest rainfalls in the world which inevitably make soil erosion and land slides a matter of foreseeable consequence wherever there is disturbance of the soil as a result of human activity. As a matter of common sense, retaining walls has become one of the bulwarks in the fight against soil erosion and in the preservation of soil to soil support enjoyed by neighbouring lands, particularly where excavation activities have become necessary on one's property.

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(iii) if the plaintiff intends to develop his land extra protection of the slope is needed, otherwise the setback as illustrated in exh P8 is necessary or very expensive foundation works are required for any building to be built near the slope;

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(iv) the plaintiff's loss of earth is 0.6294 acres and the loss for the setback is 1.2843 acres.

The defendant raised the following defence:

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(a) that at the time of the first incident the plaintiff was neither the registered proprietor nor was he in legal possession of Lot 1360, and hence the plaintiff does not have capacity to maintain an action in this respect;

(b) that as for the second incident, that the trespass was incidental and minimal besides being unintentional, and is mitigated by the need to do so in order to lower the levels on the access reserve;

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A Therefore, the defendant prays that the declarations and injunctions should be refused and that only nominal damages should be awarded for the alleged trespass.

The defendant contended that there are two incidents of trespass. The first incident occurred before the plaintiff became the registered proprietor of Lot 1360 as shown in the survey conducted in July 1991 (per B-8 dated 25 July 1991), and the other incident happened thereafter, as shown in the survey done in January 1993 (per B-20). The defendant commenced earthworks on its land in January 1991, and in June 1991 when the plaintiff discovered that the defendant was cutting into his land, the plaintiff on 10 June 1991 wrote to the defendant pointing out to the defendant of the fact that the defendant had recently excavated the hill and the access reserve abutting his land which involved cutting an extremely steep slope on the access reserve thus depriving him an access through the access reserve. All these took place before the plaintiff became the registered owner of lot 1360. Although the plaintiff entered into a sale and purchase agreement dated 30 March 1991 to buy Lot 1360, he became the registered proprietor only 27 July 1991. Under cl 6 of the sale and purchase agreement, the plaintiff was entitled to vacant possession of the land as at the completion date or such other date to be agreed in writing. Although the completion date is not defined, it obviously cannot mean the date the agreement was entered into. It must relate to the time the sale is completed and hence, it must at least mean the date the memorandum of transfer was presented which will be the same date the plaintiff became registered as the proprietor. The learned counsel for the defendant argued that as trespass is in essence a remedy for the infringement of possession and accordingly, to sue in trespass, a plaintiff must have been in actual possession at the time of the infringement. Therefore, as the first incident occurred before the plaintiff had actual possession of the land, the plaintiff had no standing to sue in respect of the incident. The counsel cited a passage in para 1-003 from the article entitled 'Unlawful Interference With Land' by David Elvin and Jonathan Karas (1995) in support thereof. With regard to the second incident, he contended that the evidence of the plaintiff's surveyor (SP2) and the defendant's surveyor (SD4) is that between 1991 and 1993 the slope previously cut in 1991 had been further cut, but there was no further encroachment horizontally. In other words, whatever form of trespass that took place at the end of 1993 was only limited to those areas which had been subjected to earthworks in 1991. The slope was further trimmed in order to accommodate the approved level for the access reserve.

H With due respect, I do not agree with such contention:

- (1) Firstly, cl 3.1 of the sale and purchase agreement stipulates that the balance of the purchase price shall be paid within three months or within one month of the removal of the private caveat, which date is the later. On the facts as agreed, the plaintiff paid the balance of the purchase price on 29 June 1991. To my mind, based on sound logic that a purchaser of the land will not pay the full purchase price unless the caveat is removed, it is irresistible to infer that, in the present case,

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the caveat must have already been removed before the plaintiff paid the balance of the purchase price. Hence, the later date as envisaged in cl 3.1 must be taken to mean 29 June 1991 when the full purchase price was paid to the vendor. Further, as the agreement was entered on 30 March 1991 and the balance of the purchase price was paid on 29 June 1991 it is clear that the full purchase price was timeously paid. And further, by reason of the fact that the plaintiff paid the balance of the purchase price and the defendant did receive it on 29 June 1991, it is safe to conclude that the requirements of cll 4.1, 4.2 and 5.1 of the agreement had been fulfilled earlier, that is to say, the vendor had given to the plaintiff's solicitors a duly executed, valid and registrable transfer of Lot 1360 in due form in favour of the plaintiff. The legal position between vendor and purchaser is well settled in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, where the Federal Court held at p 29:

In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divest himself of his interest in the land.

Therefore, based on this authority, as at 29 June 1991, the vendor was a bare trustee and the plaintiff became entitled to possession of the land in law; and by cl 6 of the agreement, the plaintiff was contractually entitled to vacant possession on completion of the sale; and hence, the plaintiff's right of entry accrued on 29 June 1991. By the doctrine of relation back, if an owner who has a right to enter makes an entry on land, his right of possession related back to the time at which his right of entry accrued, and he may sue for a trespass committed before his entry, the wrongdoer thus becoming a trespasser by relation (see *Halsbury's Laws of England* (4th Ed) para 1397 and *Clerk & Lindsell on Torts* (17th Ed) p 850). The plaintiff and his agents entered and took physical possession of the land on 18 July 1991 (see *Ikatan B* p 8), that is to say, before the first incident, when the first survey was conducted. Therefore, by the doctrine of relation back, the plaintiff is clearly entitled to maintain this action even though he was not in physical possession at the time of the first incident.

- (2) Secondly, the issue of possession was not pleaded by the defendant. In para 5 of the statement of claim the plaintiff alleged that in or about July 1991, he discovered that the defendant had in the process of executing the development works, excavated a steep slope on the access reserve abutting his land and otherwise encroached and/or cut into his land, the particulars of which are stated therein. The defendant, in response to the allegation, by paras 5–7 in the defence, did not raise or allude to the issue of possession. In consequence, the plaintiff had no opportunity to rebut the issue in the reply. The

A defendant in para 2 of the defence merely stated that the plaintiff was registered as the proprietor of the land only on or about 27 July 1991 and in cross examination, the plaintiff (SP1) was only asked as to when he became the registered proprietor of the land. To my mind, this is not a defence to an action for trespass because trespass is essentially an interference with the possessory rights and not ownership, since registered ownership does not usually connote legal possession. Therefore, on the pleading as it stands and the evidence adduced in law and in the interest of justice, the defendant should not be allowed to submit on the issue of possession, being repugnant to all the three situations as envisaged in O 18 r 8(1) of the Rules of the High Court 1980. The proper defence to trespass to land is to deny possessory title of the plaintiff which must be specially pleaded (see *Bullen and Leake and Jacob's Precedents of Pleadings* (12th Ed) at p 1324).

(3) Thirdly, there is only one slope, that is to say, the slope as evidenced by the survey at B-20, which is the subject matter of the plaintiff's claim and for which the plaintiff is seeking relief.

(4) Lastly, the plaintiff's cause of action is based on both tort of trespass and nuisance. It is trite law that the duty of care owed by the landowners to their neighbours not to disturb or withdraw natural right to support, that is to say, soil to soil support will give rise to a cause of action in negligence and/or nuisance (see *Wong See Lee & Ors v Ting Siik Tay* [1997] 2 CLJ 205 at p 224). Yet, the defendant submitted only on trespass but not nuisance. Trespass is interference with possession of land, whereas nuisance is interference with the use of land. This cause of action is based entirely on the state of land and the damages caused thereby at the date of the action, and hence, the first incident is not relevant.

Therefore, I conclude that the defendant is liable to the plaintiff both in trespass (but not in respect of the permanent trespass because it is not for me to consider as it was not pleaded) and nuisance, and that the plaintiff had suffered actual damage in consequence of the torts committed by the defendant.

On the remedies sought by the plaintiff, I decline to grant the declarations and the injunctions because:

(i) in respect of declarations (a) and (b), the access reserve is already obsolete in view of the surrounding development where there is an alternative access to the plaintiff's land. Further, in the course of submission, the plaintiff indicated that he was no longer interested in the access through the access reserve under the existing state of the land;

(ii) for injunction (c), since the incident, except for the construction of the crib wall, there had been no complaint of any alleged intrusion. Further, there is no reason now for the defendant to enter into the plaintiff's land;

(iii) with regard to mandatory injunctions (d), (e) and (f) and order (g), the plaintiff indicated during the submission that he was no longer interested in the reinforced earthwall because it might pose a serious danger to the residents of the condominium below on the defendant's land during the course of its construction. Further, a thorough supervision by an expert appointed by the parties or the court will be required in the course of its construction.

With regard to compensatory damages, the counsel for the defendant urged that, on principle, the value of the land must be assessed as at the time of the alleged damage.

This general principle is no longer good law and has been sited and disapproved by the English Court of Appeal in *Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors* [1980] 1 All ER 928, at least so far as it seeks to apply to the cost of reinstatement of damaged properties.

Megaw LJ in the *Dodd Properties* case states with approval of the broad fundamental principle as to damages of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 where he said that the measure of damages is:

... that sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

This fundamental principle also received recognition by Edgar Joseph SCJ in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352 which echoed his earlier position in *Templeton v Low Yat Holdings Sdn Bhd* [1993] 1 MLJ 443 at p 454, where he said:

In adopting a fresh approach, I consider I must fall back on the broad fundamental principles on the damages enunciated by Lord Blackburn 112 years ago in *Livingstone v Rawyard Coal Co* ...

In applying this fundamental principle, Donaldson LJ in the *Dodd Properties* case adopted the principle as follows:

The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage or occasionally a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.

- A** The judgment of Donaldson LJ is accepted by the Malaysian Supreme Court in *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309 which is a case where the court had awarded damages both for costs of repair and diminution in value as envisaged by Donaldson LJ.

The following facts are pertinent for the purpose of assessment:

- B** (i) the plaintiff bought the land at RM52,000 per acre;
(ii) the land was still agricultural at the time of the incidents;
(iii) on 1 July 1992, the plaintiff applied for conversion to residential (re B-14 and B-15);
- C** (iv) on 6 June 1996, the conversion was approved (re B-218);
(v) on 7 August 1996, SP4 valued the property based on the layout plan at B-234. In his report, he valued the land at RM35 psf (re B-280) and at the trial he valued at RM38 psf;
- (vi) on 12 March 1997, the plaintiff applied for subdivision of the land as per layout plan @ B-234;
- D** (vii) on 14 August 1998, the subdivision was approved (re 1k D).

On those facts, the following are discernible:

- (i) at the time when the torts were committed, the land was still agricultural and that the plaintiff had no definite development plan, though he intended to develop his land;
- E** (ii) the valuation was based on the layout plan which had not been approved.

- On those facts, to my mind, whichever value of the land is taken for the assessment, that is to say, either the value at the time when the torts were committed or the value at the date of valuation, it will be unrealistic and unfair to either party, as the case may be. Therefore, I decline to assess damages by taking the capital value of the property in an undamaged state and comparing it with its value in damaged state, that is to say, diminution in value cannot be the true measure of damages in this case. And also, on the facts, I am unable to assess as such. Hence, the only alternative left is to take the cost of repair or reinstatement, which, to my mind, is the true measure of damage since I am satisfied from the evidence that all along the plaintiff intended to develop the land according to the subdivision as approved. Even if the plaintiff now changes his mind and wants to sell the land, it is doubtful whether the property in its existing state can be sold at all or at a good price due to the substantial costs that will have to be expanded in stabilizing the slope. In any event, if the plaintiff is to put the land to any use at all, the construction of a retaining wall is the only solution because the danger to life and property, both to the occupants above and below, is clearly foreseeable. The computation and quantification of the cost of reinstatement had been established by SP5 in his testimony and report in 1993 at RM3m (B-71) based on plans B-21 and B-22 which had not been seriously challenged. Although the figure is only an estimate and SP5 did not have any particular type of wall in mind, I accept that figure as
- F**
- G**
- H**
- I**

reasonable for the cost of reinstatement by reason of SP5's vast experience as a professional and qualified engineer. As the figure was given some eight years ago, to my mind, it is appropriate to increase it by at least 20%, that is to say, to RM3.6m. With that amount the plaintiff will be in a position to take positive steps to stabilize the slope in order to meet his requirements in the development of his land, which will be at his discretion and risk.

In respect of exemplary damages, the award is restricted to three categories, namely:

- (a) oppressive, arbitrary or unconstitutional conduct by government servants;
- (b) conduct calculated to result in profit to the defendant; and
- (c) where expressly authorized by statute.

(See *Rookes v Barnard* [1965] AC 1129.)

In the present case, only category (b) is relevant. In *Rookes*' case, Lord Devlin states as follows:

Where a defendant with a cynical disregard for the plaintiff's right has calculated that the money he made out of his wrongdoings will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expenses of the plaintiff some object — perhaps some property which he covets — which he either could not obtain at all or not obtain except at a price greater than he wants to put down.

And in *Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd*, Edgar Joseph Jr SCJ referred to the expression 'calculated to make a profit' thus:

In *Cassel & Co v Broome* [1972] 1 All ER 801 Lord Morris explained the ambit of the expression 'calculated to make a profit' used by Lord Devlin in *Rookes v Barnard*. This is how he put it at p 843: There may be exemplary damages if a defendant has formed and been guided by the view that though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.

A tortfeasor should not be allowed to obtain a benefit or pecuniary advantage from his wrongdoings (*McGregor On Damages* (15th Ed) para 456). The three criteria for the calculation of exemplary damages are:

- (a) the plaintiff must be the victim of the punishable behaviour;
- (b) there must be moderation in the award so as not to amount to a greater punishment than would be likely to be incurred if the conduct was criminal; and

- A** (c) the financial means of the parties.

(See Lord Devlin in *Rookes v Barnard*.)

However, the conduct of the parties must remain a relevant consideration in the calculation, and on this, *McGregor On Damages* para 465 states:

- B** Then the court may take into account, according to the decision in *Praed v Graham*, the conduct of the defendant right down to the time of judgment ... An apology by the defendant in the witness box would make a difference in his favour, according to Singleton LJ in *London v Ryder*, while persistence in the charge might increase exemplary damages.

- C** And in considering the means of the parties, the size of the award must be sufficient to punish the wrongdoer as the gist of exemplary award is punitive (*McGregor On Damages* para 465).

To my mind, the following facts will justify an award of exemplary damages:

- D** (a) In June 1991, the plaintiff had, by letter, alerted the defendant of the steep slope at the boundary of his land caused by the excavation, but the defendant took no steps to investigate the complaint and appeared to have continued with the excavation. By a letter dated 5 August 1991, the plaintiff had forwarded to the defendant a copy of the survey (B-8) showing conclusively the facts of trespass, but the defendant appeared to have ignored the implication. In reply, dated 5 August 1991, the defendant had stated that the defendant would instruct their surveyor to carry out a survey to confirm the position, and thereafter to resolve the matter amicably with the plaintiff. However, the defendant caused the first survey to be done only in August 1992 (B-244), by which time the slope had increased by another 19ft in height. By December 1992, when the plaintiff conducted a second survey (B-20) which by comparison with his first survey, the slope had increased by another 49ft and also in length and depth. The trespass was therefore deliberate and intentional and carried out with a cynical disregard for the plaintiff's rights;
- E**
- F**
- G** (b) The defendant's conduct was calculated to result in a profit. SP5 testified that the defendant would not lose any land if the slope was placed on the plaintiff's land as done (B-245). The defendant would also save in not putting up the retaining wall. In his report (B-78) and illustration (B-91), SP5 had set out four methods in which the defendant could have reduced the platform level of the condominium area to the present level without encroaching onto the plaintiff's land. By method B which would involve the excavation of the slope from the access reserve onto the condominium area, the defendant would not be able to utilize approximately 42,000 sq ft of own land and to excavate a slope on the defendant's own land by method D, the defendant would be deprived of the use of approximately 57,000 sq ft of land. By methods A and C, the construction of a retaining wall would be necessary which would be expensive.
- H**
- I**

- (c) It is reasonable to gather from para 12 of the defence that the defendant obviously felt that the gain from the deliberate trespass would outweigh the compensation he might have to pay. It states: **A**

The defendant avers that Lot 1360 has no development potential as claimed by the plaintiff and that the purported proposal of the plaintiff to develop Lot 1360 into a residential housing condominium is an utter fabrication which has no relation to the realities affecting Lot 1360 as an agricultural land. **B**

- (d) The conduct of the defendant from 1991 to the trial of the action has been reprehensible, as disclosed from the following facts:

- (i) the excavation on the plaintiff's land was carried out before the earthworks plan was approved and consequently illegal and unauthorized; **C**

- (ii) despite verbal and written promises, the defendant to date has not approached the plaintiff to discuss in resolving the problem and the plaintiff's consulting engineers' numerous efforts to suggest remedial works have not met with any response; **D**

- (iii) despite indisputable evidence represented by the survey plans, the defendant persisted in denying encroachment and proffered the unarguable defence that the earthworks were sanctioned by the appropriate authorities and/or that there were no further encroachment between the plaintiff's first survey (B-8) and the second survey (B-20). As a result, the plaintiff's land was tied up in legal action for almost eight years and effectively frozen; **E**

- (iv) the defendant's representative, SD1, and the project manager SD5 were, since the beginning of this action and at the beginning of this action and at the trial, less than candid, endeavouring to justify and sustain the obviously unsustainable; **F**

- (v) in contemptuous disrespect of the law and to the plaintiff's right and the remedies sought, the defendant had in the midst of this action, proceeded with further works at the slope by constructing the crib wall without notice to the plaintiff or his consultant, resulting in permanent encroachment and affecting future remedial works. **G**

I am persuaded to follow the case of *Templeton v Low Yat Holdings Sdn Bhd*, where the court awarded exemplary damages of about 25% of the compensatory damages assessed. Therefore, the exemplary damages that should be awarded in this case is 25% of RM3.6m, which is RM900,000. In my view, that amount is sufficient to punish the defendant, a developer of a multi-million ringgit development. **H**

Therefore, judgment is hereby entered against the defendant with costs as follows: **I**

- (1) To pay the plaintiff :

- (a) RM3.6m as compensatory damages;

- A** (b) RM900,000 as exemplary damages;
(c) RM16,248 as special damages.
- (2) For items (a) and (b), the interest is at 8% pa from the date of the service of the writ until the date of judgment, and for item (c) at 4%pa from the date of the respective engagement of the surveyor and the engineer to date of judgment; and on all the items at 8%pa from the date of judgment until realization.
- B**

It is to be noted that although the hearing was completed quite some time ago, I was not able to finalize this judgment sooner, mainly due to indecision on the part of the plaintiff to seriously pursue with his application to adduce further evidence and to amend the statement of claim which was subsequently withdrawn, and the waiting for the confirmation from the land office on the status of the access reserve in the light of the existing developments in the vicinity indicating the availability of an alternative access to the contiguous lots which has a bearing on my judgment in respect of the declarations and the injunctions sought in relation to the access reserve, which was recently received.

D

Order accordingly.

Reported by Peter Ling

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